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In The

Supreme Court of the United States

October Term, 1982

HOWARD L. CRIDEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD BEN-VENISTE
BEN-VENISTE & SHERNOFF
Attorneys for Petitioner
4801 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20016
(202) 966-6000

7961 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the government's conduct in ABSCAM ensnaring petitioner Howard Criden in illegal activity through the use of an agent provocateur (Melvin C. Weinberg) and his corrupt, unwitting accomplice (Angelo J. Errichetti) — solely for the purpose of prosecuting petitioner and his co-petitioners — was so outrageous as to violate due process of law and fundamental fairness.

2. Whether the prosecution's misconduct in suppressing evidence and deliberately misleading the jury, defense counsel and the trial court and deliberately creating massive pre-indictment publicity violated due process of law and fundamental fairness.

PARTIES

The parties to the proceeding before the Court of Appeals for the Second Circuit whose judgment petitioner seeks to reverse were defendants-appellants Michael O. Myers, Angelo J. Errichetti, Louis Johanson and Howard L. Criden (Nos. 81-1342, 81-1343, 81-1344 and 81-1441, respectively), Frank Thompson, Jr. and John M. Murphy (Nos. 81-1345 and 81-1346, respectively), and Raymond F. Lederer (No. 81-1347), and appellee the United States of America.

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No.

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OPINIONS BELOW

The opinion of the Court of Appeals, reported at 692 F. 2d 823 (2d Cir. 1982), appears in Appendix A to the petition of John M. Murphy (hereinafter "Murphy App. A"), to which reference is made herein. The opinion of the Court of Appeals on petitioner Criden's petition for rehearing, not officially reported, appears as Appendix A hereto. The opinion of the United States District Court for the Eastern District of New York (Pratt, J.), reported at 527 F. Supp. 1206 (E.D.N.Y. 1981), appears in the appendix

to the petition of Frank Thompson (hereinafter "Thompson App."), to which reference is made herein.

JURISDICTION

The judgment of the Court of Appeals was dated and entered September 3, 1982. A timely petition for rehearing was denied on November 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rules 17.1(a) and (c) of the Rules of this Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural Background

Petitioner Howard L. Criden ("Criden") was charged in a three-count indictment alleging (1) a conspiracy to commit bribery

and to defraud the United States in violation of 18 U.S.C. §§201 and 371; (2) bribery of a public official in violation of 18 U.S.C. §201; and (3) unlawful travel in interstate commerce in violation of the Travel Act, 18 U.S.C. §§1952 and 2. Charged with Criden were Michael O. Myers, then United States Congressman for the First District of Pennsylvania; Angelo J. Errichetti, then Mayor of Camden, New Jersey; and Louis Johanson, then a member of the Philadelphia City Council. At the time of the indictment, Criden was 53 years of age and a partner in the Philadelphia law firm of Criden, Johanson, Dolan, Morrissey and Cook.

At the conclusion of a three-week jury trial presided over by the Honorable George C. Pratt, United States District Judge for the Eastern District of New York, Criden and his co-defendants Myers, Errichetti and Johanson, were convicted on all three counts of the indictment. After extensive post-trial hearings, Judge Pratt denied motions by petitioner and his co-defendants to vacate the guilty verdicts and dismiss the indictment on the ground that the government's conduct in the ABSCAM investigation and in the prosecution of charges at trial violated the Due Process Clause of the Fifth Amendment.

Thereafter, Criden's sentencing was delayed because he suffered a heart attack. On October 7, 1981, Criden was sentenced to concurrent periods of imprisonment for five years on each of Counts One and Three, and six years on Count Two, and to fines totaling forty thousand dollars ($40,000.00).

In an opinion dated September 3, 1982, the United States Court of Appeals for the Second Circuit (Lumbard, Friendly and Newman, JJ.), denied Criden's appeal from his conviction.[1] On

1. By the same opinion, the Court of Appeals affirmed the convictions of petitioner Criden's co-defendants Myers, Errichetti and Johanson and the convictions, in related ABSCAM cases, of defendants-appellants Frank Thompson, Jr., John M. Murphy (with the exception of his conviction on Count Three of the indictment against him, which was reversed and remanded for new trial), and Raymond F. Lederer (*see* 692 F. 2d at 826; Murphy App. A at 2a).

November 17, 1982, the Court of Appeals denied Criden's motion for rehearing.

Factual Background

"ABSCAM" is the code word given by the Federal Bureau of Investigation ("FBI") to an undercover operation undertaken by the FBI office at Hauppauge, Long Island, New York in January 1978 . ABSCAM began when the FBI adopted the plan of Melvin C. Weinberg, a long time confidence man who for several years in the mid 1970's, and while listed as an informant by the FBI, operated a "front-fee" confidence game utilizing a ruse similar to what became the ABSCAM premise (T 1862).[2] Although

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2. The following abbreviations have been used for citations to the record herein:

a. "DP____" refers to the transcript of the joint due process hearing before Judge Pratt held from January 12 through February 16, 1981. "DP Ex.____" refers to exhibits introduced during the due process hearings before Judge Pratt.

b. "T____" refers to the transcript of the trial in *United States v. Myers, et al.*, Cr. No. 80-00249, 80-00253 and 80-00291 (E.D.N.Y.), held on August 11 through August 30, 1980. "Gov't. or Def. Ex.____" refers to exhibits introduced during the *Myers* trial.

c. "PDP I____" refers to the transcript of hearings before Judge Fullam in *United States v. Criden, et al.*, Cr. No. 80-166 (E.D. Pa.) held on July 7 through July 30, 1980. "PDP II____" refers to a second series of hearings before Judge Fullam held on September 24 through September 26, 1980.

d. Other references to other ABSCAM trials, hearings or exhibits are in the same form, *e.g.*, the *Jenrette* trial transcript is referred to as "Jenrette T____"; the *Jenrette* due process hearing is referred to as "Jenrette DP____," etc.

finally caught and convicted for this fraudulent scheme,[3] Weinberg escaped the three-year jail sentence imposed after his conviction by making a deal to work for the FBI (527 F. Supp. at 1209; Thompson App. at 91a).

Under the ABSCAM scheme, Weinberg was to present himself as a business agent for "Abdul Enterprises," an organization backed by two extremely wealthy Arab sheiks looking for American outlets for their cash (*id.*). At first the ABSCAM investigation focused on the recovery of stolen art work and other contraband (*id.*). It was not until December 1978, when Weinberg met with then Camden Mayor Angelo Errichetti, that the investigation turned to political corruption (DP 4321).

Errichetti

Between December 1978 and July 1979 Errichetti was involved in a myriad of dealings with Weinberg and various FBI undercover agents who played supporting roles to Weinberg's lead. Among Errichetti's early ABSCAM episodes were his dealings with New Jersey Casino Control Commissioner Kenneth MacDonald and United States Senator Harrison Williams. Throughout his dealings with Errichetti, and with the explicit consent of his FBI supervisors, Weinberg portrayed himself as a corruptly disloyal employee of an Arab sheik of enormous wealth (T 1859-60). Moreover, Weinberg represented that he and those whom he selected as confederates could make personal fortunes by manipulating the sheik through the trust he placed in Weinberg. Errichetti, far from a shrinking violet, plunged into partnership with Weinberg. As discussed *infra* at pages 18-20, 22-25, despite petitioner's repeated discovery and *Brady* demands, it was not until the Senate Select

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3. This scheme netted Weinberg perhaps as much as one million dollars ($1,000,000.00) on which he paid no taxes (T 1925-25, 3400).

Committee released its findings in December 1982[4] that petitioner learned of the full extent of the arrangements made between Weinberg and Errichetti to share in bribes and fees, or the devious maneuvers Weinberg utilized to defraud his FBI superiors.

Criden and Johanson

The ABSCAM investigation had been ongoing for almost 18 months before petitioner and his law partner Johanson were lured into its web in their quest to obtain financing for a client's Atlantic City hotel-casino project (527 F. Supp. at 1210; Thompson App. 95a-96a).[5] In the course of inquiring as to financing sources for his client's project, Johanson was referred to Errichetti who, in turn, referred the matter to Weinberg who arranged for a discussion in Florida (*id.*).

On July 26, 1979, Criden, Johanson and Errichetti met with Weinberg and FBI Agent Anthony Amoroso ("Tony De Vito") on a yacht provided by the FBI (*id.*). Criden had not met either Errichetti or Weinberg prior to this meeting.

On the yacht, Criden and Johanson showed Weinberg and Amoroso architectural renderings and financial projections relating to the hotel-casino project (PDP I 7.20-22; T 579). Weinberg and Amoroso told Johanson and Criden that the sheik would be interested in the project (T 923). Weinberg further stated that he expected to secure the sheik's approval within 30 to 60 days (PDP I 1.8).

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4. Final Report of the Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice (December 15, 1982) (hereinafter "Senate Select Committee Report").

5. The client had agreed that if the desired financing were to be obtained through Criden's efforts, a very substantial fee, between $3-5 million, would be earned by Criden's firm (PDP II 1.9). The government conceded that the attempt to arrange financing for the project was a legitimate business proposal (T 882, 1003, 1267; PDP I 3.123; PDP II 3.35).

Following the discussion of the hotel-casino project, the group took a pleasure cruise. During this trip, Amoroso stated to Errichetti that the sheik was concerned about political asylum because he anticipated that he would be forced to emigrate from his country in the future and wished to protect himself against the immigration problems experienced by Anastasio Somoza, the former Nicaraguan government leader, whose difficulties in obtaining asylum in the United States were then being detailed by the press (527 F. Supp. at 1210; Thompson App. at 95a-96a; *see also* T 580-81). Errichetti responded that "he could line up proper politicians to handle it" (T 581). Amoroso volunteered that money "would be no problem" (T 581).

On their return flight to Philadelphia, Errichetti told Criden that he looked upon the opportunities provided by the sheik through Weinberg as "fantasy, a fairytale" (PDP II 1.9, 1.117). Errichetti related that he had had prior business dealings with the representatives of the sheik and that the sheik would pay "substantial fees" to meet public officials with titles (PDP II 1.9). In this regard, Errichetti stated that he previously received a fee of $100,000 merely for introducing the representatives of the sheik to a public official (PDP II 1.10).[6] According to Errichetti, the sheik merely wanted to be associated with public officials; there were "no strings attached" (PDP II 1.117). Errichetti told Criden that if Criden were to introduce political figures to the sheik, it would enhance his chance to obtain financing for his client's hotel-casino project as well as result in a handsome fee for Criden (PDP II 1.119).

Upon his return to Philadelphia, Criden discussed the matter of introductions to politicians with his law partners, including Johanson (692 F. 2d at 830; Murphy App. A at 13a). Specifically,

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6. This apparently related to a $100,000 payment received by Errichetti in connection with the MacDonald matter. *See* p. 23, *infra*.

Criden explained that an introduction fee would be earned by the firm and shared with the politician and Errichetti merely for setting up a meeting with the sheik. No *quid pro quo* was involved; the politician would not be asked to do anything in return for the money (T 1268; PDP II 1.14). Johanson agreed to contact United States Representative Michael O. Myers, whom he knew as a fellow Philadelphia ward leader. (*See* 692 F. 2d at 830, 831; Murphy App. A at 13a, 16a.)

Myers

In early August 1979, Johanson met with Myers and Johanson described to him the "rich Arab sheik" who would pay $100,000 in return for introductions to important persons (T 2709). Johanson told Myers that he and Criden would receive $25,000 as a share of this fee for arranging the introduction and that Myers would receive the same amount as his share. The balance, stated Johanson, would be split among Errichetti, Amoroso and Weinberg (T 2712). When Myers asked Johanson whether anything would be expected of him, Johanson assured Myers that Myers would not be required to do anything in return for the money (T 2712). Johanson concluded the conversation with the comment that Errichetti would tell Myers "word for word just what to do and what to say" (T 2713).

Thereafter, a meeting was scheduled for August 22, 1979 at the Travelodge International Hotel at Kennedy Airport in New York (692 F. 2d at 830; Murphy App. A at 14a). Immediately prior to this meeting, Errichetti met with Myers, telling the Congressman

> You've got to come on strong . . . Did you ever see me on television? . . . You know how positive I am, how strong I come on? That is the way you've got to act. The Sheik likes tough guys. Tell

> how powerful you are. Maybe talk about immigration. You will never do anything. Don't worry about that. I got that covered. . . . Mel is going to be in the room with us. Mel is our friend. He wouldn't let anything happen to get you in trouble. (T 2717).

Loathe to leave anything to chance, Weinberg slipped out of the hotel room where FBI technicians were making final preparations to videotape the meeting, and, ostensibly without the knowledge of the FBI supervisor in charge of the investigation (DP 2673), went to the hotel lobby to give Errichetti a final set of instructions (T 1650). (*See* discussion *infra* at pages 15-16.)

Thereafter, Errichetti informed Myers of a change of plans, *i.e.*, that the sheik would not be at the meeting, although one of his representatives would be present. Myers, who had previously been assured by Errichetti that he could talk about any topic since the sheik was not fluent in English, expressed concern that questions would be asked of him which he could not answer (T 2718). Errichetti responded:

> Tell them [you will] do anything they want, don't worry about that. You don't ever have to worry about the Sheik coming to America because Mel already told me if he has to leave his country arrangements have been made in South America and they never intend to come to America. (T 2718).

Myers and Errichetti then went up to the hotel room where Weinberg and Amoroso were waiting. Neither Criden nor Johanson attended this meeting although both had come to the airport. Neither Criden nor Johanson was invited to participate

in the conversations wherein Weinberg instructed Errichetti and Errichetti coached Myers.[7]

Myers cannot be criticized for underplaying his role. In the course of the August 22, 1979 meeting he repeatedly exaggerated his position, influence and personal associations (692 F. 2d at 830-31; Murphy App. A at 14a). Myers readily agreed to assist the sheik with any immigration problem and, if necessary, to introduce a private bill on the sheik's behalf (*id.*). At the conclusion of the meetings, Myers was handed an envelope by Amoroso containing $50,000 in cash (*id.*). Upon leaving the hotel room, Myers gave the envelope to Errichetti and Johanson and Myers immediately drove back to Philadelphia. (*Id.*; *see also* T 2740.) Myers never saw or spoke to Errichetti again (T 2740).

Prior to departing from New York, Errichetti met briefly with Criden and transferred the envelope to him, after removing $15,000 as his share of the proceeds. (*See* 692 F. 2d at 831; Murphy App. A at 15a.) Criden then returned to his law office in Philadelphia where he met with Johanson and Myers (*id.*). Myers accepted $15,000 and then departed (*id.*).

Aside from the general report from Errichetti to Criden that Myers had done well, no one reported the substance of the meeting to Criden or Johanson.

Consistent with Weinberg's assurances (to Errichetti, and, indirectly, to Myers, Criden and Johanson) that Myers would never be called upon to do anything for the Sheik, Myers was never asked by the investigators for so much as a telephone call or letter of inquiry on official stationery to demonstrate a willingness to actually use his position in return for the money he accepted.

7. The Court of Appeals erroneously attributed to Criden a role in coaching Myers (*see* 692 F. 2d at 837, 838, 840 and n.14, 842; Murphy App. A at 28a, 31a, 36a and n.14, 41a). Manifestly, the evidence showed that Criden played no part in Myers' coaching (T 2715-19).

Criden Replaces Errichetti

In the ensuing months Criden became more entangled in the ABSCAM web. With the possibility of concluding the Atlantic City hotel-casino financing deal and with other attractive business opportunities dangled before him, Criden continued to try to accommodate Weinberg's voracious appetite for public officials to meet the sheik's representatives and collect their free money. Criden eventually replaced Errichetti (who had tired of Weinberg's inability to deliver on promises of major projects to be funded by the sheik) in fishing the rivers and tributaries of public officialdom — using the promise of hundreds of millions in investments in the politician's district as bait for the desired meetings. Although only one of these transactions — a January 24, 1980 meeting among Criden, Myers and two FBI undercover agents — was admitted into evidence at trial, we mention them here in order to illustrate the evolving relationship between Criden, Errichetti and Weinberg.

The January 24, 1980 Meeting

Although Eastern District Strike Force Chief Thomas P. Puccio submitted his pre-prosecution memorandum covering, *inter alia,* Representative Myers in December 1979, the United States Attorney's Office in Philadelphia requested an opportunity to lure Myers into another videotaped session where local Philadelphia corruption could be discussed. Criden was selected as the appropriate vehicle to arrange Myers' return engagement.[8]

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8. By late January 1980, Criden was dealing with the sheik's representatives on a C.O.D. basis — irrespective of whether the politician he produced would mouth the words triggering payment to him, Criden was promised, and received, payments simply for bringing politicians to the scheduled meetings (PDP II 1.46-51). In the case of the "second" Myers meeting, Criden was promised $5,000 merely for producing Myers at the meeting (PDP II 1.46).

Weinberg advised Criden that the sheik, who proposed to build a multi-million dollar hotel complex in the slums of South Philadelphia, wanted assurances from local office holders that he would not run into zoning problems for such a project.[9] Weinberg suggested that Criden introduce Representative Myers to a Michael Cohen, who was identified to Criden as a "new" representative of the sheik, but who actually was FBI Agent Michael Wald (PDP II 1.48).

Thus Criden telephoned Myers on January 24, 1980, inviting him to meet the sheik's "new" representative who was interested in investing money in Philadelphia (T 2743). Myers agreed to meet Mr. Cohen that evening at the Barclay Hotel in Philadelphia (692 F. 2d at 831; Murphy App. A at 15a). Myers testified at trial that he believed the same ground rules applied at this meeting as were applicable at the prior meeting, namely that he "had to impress them that [he] was a strong guy the same way [he] did back in the August meeting" (T 2747).

Again, Myers' performance must have exceeded the investigators' expectations. Aided by substantial quantities of alcohol pressed on him by the agents, Myers again exaggerated his importance and his association with various "influential" individuals.[10] Myers also complained that he had been short-changed in his earlier dealings with the sheik's representatives, and the undercover agents offered to pay him an additional $35,000

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9. For a summary of this undercover scenario, *see United States v. Jannotti*, 501 F. Supp. 1182, 1193-99 (E.D. Pa. 1980), *rev'd*, 673 F. 2d 578 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

10. For example, when Cohen asked him about the Philadelphia Mafia, Myers boasted of his relationship to one "Skinny Razor" whom he described as a big man in the Mafia's downtown operation in Myers' own district (Gov't. Ex. 7A at 83). In point of fact, the said Mr. Razor — the subject of a lurid newspaper story in Myers' youth — had been dead for over a decade (T 2625-26).

(692 F. 2d at 831; Murphy App. A at 15a). Consistent with Weinberg's previous assurances, no request was made of Myers after this meeting to perform the slightest official act. The tape of the January 24, 1980 meeting was admitted into evidence over the objections of all defendants (T 2571).

REASONS FOR GRANTING THE WRIT

I.

The government's conduct in ensnaring petitioner in illegal activity was so outrageous as to violate due process of law and fundamental fairness.

In utilizing Weinberg and Errichetti to produce and compromise Representative Myers at the August 22, 1979 meeting, the government was relying on men of *proved* unreliability, whose willingness to lie, misrepresent and otherwise play fast and loose with the truth to satisfy their own ends already was well documented. Judge Fullam found that Weinberg "represented the archetypical amoral fast-buck artist." *United States v. Jannotti,* 501 F. Supp. 1182, 1193 (E.D. Pa. 1980), *rev'd,* 673 F. 2d 578 (3d Cir.), *cert. denied,* 102 S. Ct. 2906 (1982). Errichetti, whose dealings with the ABSCAM undercover operatives had predated the Myers transaction by some eight months, was already known by the ABSCAM investigators to exaggerate, boast and generally go beyond the limits of truthfulness in his dealings with Weinberg and others. Despite knowledge of Weinberg's and Errichetti's lack of trustworthiness, the government made no effort to impose even minimum safeguards on their involvement in the ABSCAM investigation.

Indeed, Weinberg was unsupervised at least half of the time he was engaged in ABSCAM (T 1054; Jenrette T 862, 924). Moreover, although Weinberg's background as a lifelong

confidence man and swindler might have suggested that he would cut corners to achieve his assigned objective of maneuvering public officials before the FBI cameras, the government did not implement special controls for Weinberg nor even seek to enforce those instructions which were given to Weinberg.

For example, although Weinberg was ordered to tape every conversation he had with a middleman or public official (T 939), he disobeyed this instruction with regularity and with impunity, and only a fraction of his conversations were recorded (DP II 1.36). And, although Weinberg claimed to have furnished to the FBI all of the tapes he made of conversations with targets and middlemen, his assertion that certain tapes were stolen from him was incredible at best (T 1839, 3413).[11]

Furthermore, Weinberg deliberately violated an instruction that he tape all conversations from beginning to end (T 939-41, 1050, 1057; PDP II 3.29; Jenrette T 911). While Weinberg claimed no tape was altered or interrupted, expert testimony established the contrary at the *Myers* trial (T 1638, 1885, 3349, 3372). Additional evidence of Weinberg's tampering with tape recordings surfaced only after the conclusion of the trial.[12]

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11. *See infra* at p. 24.

12. For example, a tape-recording of a July 14, 1979 conversation between Weinberg and George Katz, a figure in the ABSCAM investigation involving Senator Williams, was not made available to petitioner and his co-defendants until the post-trial due process hearings (DP Ex. 58). This tape, which included a 57 foot gap, provides a cornucopia of compelling circumstantial evidence supporting a number of petitioner's contentions at trial. Significantly, this tape demonstrates that two weeks prior to Criden's meeting on the yacht with the sheik's representative, Weinberg set forth the essential elements of the asylum scenario and the double sting, *i.e.* that the politicians would not be called upon to perform (DP Ex. 58 at 3, 11, 14-16, 21-23, 29). (*See also*, discussion *infra* at p. 25.)

Moreover, Weinberg was given carte blanche in his contact with middlemen allowing him "to operate in the manner he thought best" (PDP II 3.17, Jenrette T 888-90, 912). Weinberg received no direction as to when he should report conversations with middlemen and such oral reports as he did make were never reduced to writing (PDP II 3.5).

Nor was Errichetti given sufficient supervision although he had become, at least as of June 28, 1979, an agent of the ABSCAM operatives for purposes of attracting public officials to meet with undercover agents (692 F. 2d at 840 n.13; Murphy App. A at 35a-36a n.13). For example, while the New Jersey prosecutors attempted to admonish Weinberg for his actions in connection with Senator Williams, absolutely no effort was made to correct Errichetti's subsequent use of those same tactics with Myers. In fact, Errichetti testified that the same scenario as was used with Senator Williams was set for Representative Myers (PDP II 1.120-22), *i.e.*, the Congressman was instructed "to come on strong," "play act," "promise anything" (PDP II 1.120, 1.134).

Nor was any effort made by the FBI to tape-record the prearranged meeting between Weinberg and Errichetti which immediately preceded Myers' August 22 scheduled introduction to the "sheik" (later modified to his representatives). (*See* discussion *supra* at page 9.) Significantly, Agent Good, who was present at the hotel prior to the August 22, 1979 Myers meeting, testified he had no knowledge that Weinberg left the room to meet with Errichetti before Myers was brought upstairs (DP 2673-74, 4153).[13] Thus, Weinberg was able to get Errichetti to do the briefing of Myers — the same duty Errichetti had shared

13. The same Agent Good acknowledged that he had authorized Weinberg to meet with Senator Williams to brief him as to what was expected to be heard from him when he addressed the sheik (Myers DP 2809).

with Weinberg *vis-a-vis* Sen. Williams — instructing him to have Myers go on stage for twenty minutes, talk tough, promise anything, that it was all "play-acting" and that the Congressman would never be called upon to do anything (PDP II 1.119-121).

Weinberg's credentials as a master con artist who spent his entire adult life living by his wits at the expense of those whose trust he gained is amply documented in the record (T 1921-30, 1993-99). That Weinberg could have been used at all seems to be a direct contravention of Justice Department guidelines.[14] But to have used him as an agent-provocateur — not as an "informant" as the government would like him characterized — was intolerable. The absence of instruction, supervision and reporting requirements relating to Weinberg allowed him to structure the investigation according to his own design, "scamming" both the targets and, presumably, his FBI and strike force "supervisors."[15]

In achieving the "bottom line" result of producing incriminating videotapes, Weinberg was armed by his supervisors with two important facts: first, he was told that the Congressmen would never be called upon to perform any official act (PDP II 3.26); and second, he was allowed to incorporate as part of the "scenario" that he and Amoroso would portray themselves as disloyal to the eccentric sheik (T 1860-61, 2102, 2107; DP 4373; PDP I 5.142).

Thus, Weinberg could with impunity assure the prospective target — be he public official or middleman — that the public official need only talk tough and come on strong, agree with whatever was suggested, and emphasize his own importance

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14. *See* DP Ex. 6, the so-called Levi Guidelines.

15. *See infra*, pp. 22-26.

(Schwartz T 2.96-97; PDP II 1.39, 1.120). All this conformed to the "Arab way" and was expected (Schwartz T 2.106). At the same time, Weinberg could give assurance that nothing would ever be requested of the official; it was all talk, "all bullshit," so that Weinberg/Amoroso and the others could split the resulting fees from the "goose that laid the golden egg" (T 1860-61). Not only did the government use a man whose *past* suggested that he would be unreliable and would have no respect for an oath to tell the truth, but his very dealings with the ABSCAM team demonstrated as much.

The Court of Appeals erred in its analysis of the adequacy of the materials made available at trial relating to Weinberg's credibility. Basically, the court found adequate the information relating to Weinberg's history of misconduct *prior* to ABSCAM and the payments he received from the government in connection with ABSCAM (692 F. 2d at 846-47; Murphy App. A at 49a-51a). But the court's reasoning misses the mark. The extraordinary danger in using Weinberg as the government did in ABSCAM was that he would *continue* to lie and cheat and would skew the investigation to maximize his rewards no matter how justice might be perverted.[16]

While the Circuit Court points to one clear example of Weinberg's coaching involving Senator Williams and Errichetti (692 F. 2d at 839-40; Murphy App. A at 32a-36a), several other examples of misconduct — known contemporaneously to the government during the investigation, as well as others which have come to light after the trial — further demonstrate Weinberg's ability to claim rewards for achievement in return for what was really a charade.

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16. It is here that the due process, government overreaching/prosecutorial misconduct argument becomes inextricably intertwined with the *Brady*, *Giglio* and *Agurs* arguments set forth *infra* at pp. 21-26.

* * *

1. The Williams Coaching Session. In June 1979, Errichetti assured Weinberg that he had instructed United States State Senator Harrison Williams as follows:

> . . . All you're gonna do is give a speech like you never gave in your life. Not much left to say. You're gonna fucking guarantee that fucking contract. . . . I said, "You're gonna fucking say it. I don't give a fuck. *Never mind about doing it. You're gonna fucking say it.*"

Senate Select Committee Report, "Allegations Regarding the Investigation of Senator Harrison A. Williams," at 56 (emphasis added). In connection with the Williams'coaching episode, FBI supervisor John Good testified that he had instructed Weinberg to meet privately with Senator Williams "to brief him as to what we expected to hear from him when he addressed the Sheik." (Myers DP 2809). The Senate Committee concluded:

> "To instruct Weinberg to meet with the suspect, without being accompanied by any undercover special agent, only moments before a crucial meeting at which an expression of the suspect's true intentions was to be sought was not merely undesireable; it was egregious."

(Senate Select Committee Report, "Allegations Regarding the Investigation of Senator Harrison A. Williams," at 60).

2. The MacDonald Pay-Off. In another pre-Myers situation involving New Jersey Gaming Commissioner Kenneth MacDonald, Errichetti candidly told Weinberg he would never offer or give MacDonald any money. Weinberg's response was that they would

"hold that in abeyance, we'll work on that."[17] (Transcript, March 8, 1979, at 27; *see also,* Senate Select Committee Report, "Allegations Regarding Kenneth H. MacDonald," at 19). Ultimately, an agreement was struck between Weinberg and Errichetti wherein Errichetti was given $100,000 in currency while MacDonald looked the other way. MacDonald was indicted but died before trial.

To add icing to the cake, Weinberg, as we now know, induced Errichetti to engage in a completely staged conversation on April 1, 1979 about the MacDonald "payoff," ostensibly for the purpose of impressing another employee of the fictitious sheik who would be "surreptitiously" listening to the "private" conversation between Weinberg and Errichetti.[18] Again, this tape was withheld from petitioner.

3. Katz Tape-Recording. In a July 14, 1979 taped conversation between Weinberg and one George Katz (DP Ex. 58), Weinberg laid out the essential elements of the devious double sting — that the politicians, even though paid, would not be called upon to perform: "between you and me we don't want and probably never even use them, you follow me?" (DP Ex. 58 at 22).

4. Williams Forgery. In another example of double-scamming, Weinberg accepted Errichetti's known *forgery* of a letter purportedly signed by Senator Williams showing support for the sheik's project when Errichetti stated that *Williams* would not himself sign such a letter (302 Report of Bruce Brady, Sept. 14, 1979; *see also,* Senate Select Committee Report, "Allegations

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17. This tape was withheld from Criden until after the Myers trial.

18. *See* Senate Select Committee Report, "Allegations Regarding Kenneth N. MacDonald," at 35.

Regarding the Investigation of Senator Harrison A. Williams," at 55 fn.).

5. The Mario Noto/Nopo Incident. The clear understanding between Errichetti and Weinberg that their partnership was based on *defrauding* the mythical sheik reached its zenith a few weeks after the August 22, 1979 Myers meeting when Errichetti produced an impersonator posing as an Immigration and Naturalization Service official to meet with Weinberg and Amoroso (T 1239, *et seq.*).

* * *

As demonstrated above, Weinberg was clearly an agent provocateur. The Court of Appeals misperceived Weinberg's role, finding that "the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so." [692 F. 2d at 837 (footnote omitted); Murphy App. A at 29a (footnote omitted)]. Furthermore, even without the benefit of information uncovered by the Senate Committee, the Court of Appeals erred in concluding that "[w]hatever may be the due process limit of government participation in crime, it was not reached here." [*id.* (citations omitted)]. Clearly, the government's involvement in the ABSCAM "crimes" surpassed the "level of outrageousness" which ought to limit the police in a free society. *Hampton v. United States,* 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring). *See also, United States v. Russell,* 411 U.S. 423, 441 (1973) (Stewart, J., dissenting). *Compare, United States v. McQuin,* 612 F. 2d 1193, 1196 (9th Cir.), *cert. denied,* 445 U.S. 954 (1980); *United States v. Quintana,* 508 F. 2d 867, 876-78 (7th Cir. 1975).

Moreover, the government's conduct was particularly egregious here because, as the trial court found (527 F. Supp. at 1226; Thompson App. at 148a), Criden and the other defendants

were not suspected of misconduct at the time they were lured into the ABSCAM net. The inducement initially dangled before Criden and his law partners to become involved with the ABSCAM operatives was overwhelming. The opportunity to earn millions of dollars in fees in connection with obtaining financing for a legitimate substantial hotel-casino project was, as one of Criden's law partners described it, a lawyer's "once-in-a-lifetime" dream come true (T 1262-63).

II.

The prosecution's willful failure to comply with its obligations to protect the integrity of the judicial process was a continuation of a course of misconduct and requires dismissal of the indictment.

The course of prosecutorial misconduct relating to the ABSCAM investigation did not cease with the return of the indictments. In several crucial areas of inquiry the prosecution either suppressed evidence or deliberately misled the jury, defense counsel and the trial court. In other areas, Weinberg's perjuries and obstructions of justice remained hidden until investigative bodies other than the Department of Justice brought them to light, well after the trial.

Despite sufficient judicial warning against the danger of uncontrolled use of "informants" who might corrupt the truthseeking process [*see United States v. Brown*, 602 F. 2d 1073 (2d Cir.), *cert. denied*, 444 U.S. 952 (1979)], and the obligations imposed by *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Agurs*, 427 U.S. 97 (1976), information crucial to the defense was deliberately withheld, and material perjury was committed in the course of petitioner's trial.

For example, the Court of Appeals concluded that "the jury was entitled to conclude that this [*i.e.*, the Myers August 22, 1979

meeting] was no charade." (692 F. 2d at 838; Murphy App. A at 32a). Conversely, however, the jury would have been entitled to reject Weinberg's denial that he orchestrated a charade in the *Myers* case, particularly if it had before it the relevant facts concerning Weinberg's willingness to orchestrate *other* charades in the same time frame for which he was paid handsomely by the FBI, as well as his obvious willingness to defraud the FBI for additional personal profit in matters material to ABSCAM.

The requirements of brevity dictate that petitioner can only list the areas relevant to this point:

1. The prosecution failed to correct Weinberg's perjurious testimony at the *Myers* trial wherein he misstated the reason for a $15,000 bonus he received from the FBI. As was later documented, a few weeks before the Myers meeting was arranged, Weinberg was paid $15,000 for his role in the MacDonald/Errichetti payoff (DP Ex. 59; T 1815). The prosecution left the defense and the trial court with the false impression that the $15,000 bonus was unrelated to ABSCAM (T 1736-38, 1776, 3045).[19] The Court of Appeals did not discuss this matter even though petitioner Criden set out the full background at pages 53-60 of his appellate brief below.

2. Weinberg defrauded the FBI out of a $5,000 bonus involving an incident wherein he supposedly risked his life to save the ABSCAM investigation (DP Ex. 61). After the trial, it was learned that Weinberg had fabricated the entire story simply to obtain money from the FBI (DP 4362).[20]

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19. As of April 1981, Weinberg had received approximately $150,000 for his ABSCAM efforts (527 F. Supp. at 1240; Thompson App. at ____).

20. *See also*, Senate Select Committee Report, "Introduction," at 36, *et seq.*

3. Weinberg surreptitiously received from Errichetti a portion of the $100,000 paid to Errichetti supposedly for MacDonald. Weinberg's deviousness in obtaining this kickback, obstructing justice and constructing an alibi for his perjurious denials provide an astounding insight into the criminal mind:

a) Weinberg deliberately failed to record a conversation with Errichetti in which plans for receipt of the kickback were made;

b) On April 1, 1979, the day after the $100,000 was paid to Errichetti ostensibly for transmittal to MacDonald, Weinberg met privately with Errichetti to receive the kickback, unbenounced to the FBI agents working with him;

c) To provide an alibi for later use, Weinberg recorded a conversation with Errichetti for which he constructed a false preamble which misrepresented the actual time of the conversation; and

d) Weinberg got Errichetti to make certain statements on the "alibi tape" by telling Errichetti that someone (whom Weinberg needed to mislead) was going to be "secretly" listening to their conversation.

All of the above was pieced together after the Myers trial by prosecutors from Washington, D.C. and members of the Senate Select Committee who had access to Weinberg's telephone toll records (which were refused petitioner). *See* Senate Select Committee Report, "Introduction," at 36-40.

4. Weinberg deliberately failed to record dozens of substantive conversations he had with ABSCAM targets and deliberately omitted portions of certain conversations from the tapes he turned in (Def. Ex. 19, 20; T 3319-24). *See also,* Senate

Select Committee Report, "Failures of Evidence Management," at 20.

5. Weinberg deliberately withheld at least one other tape recording he had made of a conversation with petitioner, falsely claiming it had been stolen from his luggage (T 1839, *et seq.*; Jenrette DP 1099-1104).[21]

6. Weinberg, with at least the government's passive assistance, perjured himself at the *Myers* trial about his unauthorized solicitation of money and other items from the targets of the investigation. At trial, the defense produced witnesses who testified to personal knowledge of various items including, *inter alia*, television sets, stereo equipment and an electronic oven delivered from Errichetti to Weinberg. Weinberg and the prosecution vigorously refuted these allegations, branding the defense witnesses as biased perjurers.

After the post-trial due process hearing Weinberg's wife committed suicide and in the course of the ensuing investigation by Florida County police, the very items Weinberg was alleged to have received were found in his home. Since the FBI agents were present in this home on several occasions *after* the allegations of Weinberg's solicitation and receipt of these specific items were made, their failure to report the items is at least suspect.[22] Unfortunately, the continued cover-up regarding these items

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21. The Senate Committee Report sets forth Weinberg's "astounding plethora of self-contradictory testimony" on this subject. *See* Senate Select Committee Report, "Failures of Evidence Management," at 41-48.

22. For an extensive discussion of this issue, *see* Senate Select Committee Report, "Management, Supervision, and Control of Weinberg," at 1-21. As to FBI supervisor Good's testimony on the subject, the Committee found: "While it may not be technically perjurious, such clearly misleading testimony constitutes unacceptable conduct that ranking FBI officials should not tolerate." *Id.* at 11 fn.

resulted in the court below crediting Weinberg's perjurious denials (692 F. 2d at 846-47; Murphy App. A at 49a-50a).

The importance of Weinberg's perjury on these items should not be underestimated. The question of whether Weinberg would lie to his FBI "supervisors" to achieve his personal goals in the investigation was central to the defense of the *Myers* case.

7. The government suppressed a July 14, 1979 tape-recorded conversation between Weinberg and "middleman" George Katz (DP Ex. 58). This tape would have greatly assisted the defense by providing an explicit recitation by Weinberg to Katz of the "double-scam" *i.e.*, that the politicians who would accept money would not have to actually do anything. Weinberg further confided in Katz that his employers ". . . don't know what's going on on our end. . . . they don't think anything's wrong on the double." (DP Ex. 58 at 29).

The court below correctly concluded that the "use of dishonest and deceitful informants like Weinberg creates risks to which the attention of juries must be forcefully called." (692 F. 2d at 846; Murphy App. A at 48a). Yet, demonstrably the trial jury here saw only the tip of the iceberg. Their ability to evaluate not just Weinberg's sordid past, but the full extent of his venality during the investigation was fatally obstructed by perjury and obstruction of justice which was not unraveled until after the trial.

To this sordid witches' brew must be added the government's outrageous and deliberate leak to the public media of the prosecution's version of the ABSCAM investigation several weeks before the return of indictments. The trial court found:

> First, the voluminous appendices to the parties' papers, containing thousands of pages of reprinted newspaper and magazine articles as well as

> transcripts of radio and television broadcasts, attest to the fact that beginning on February 2, 1980 and continuing to the date of these indictments and beyond, the public was deluged with media reports of the ABSCAM investigation into these defendants' activities. Moreover, many of these reports were replete with what may charitably be characterized as hostile statements and innuendo, treating the defendants' guilt as a foregone conclusion, itemizing the "evidence" against them, and reporting that "indictments were forthcoming." Finally, we must, in the light of the government's admission of the fact, accept the contention that many of these reports contained information supplied by one or more Justice Department officials. . . .

United States v. Myers, 510 F. Supp. 323, 324-25 (E.D.N.Y. 1980).

CONCLUSION

The combination of governmental overreaching in creating crime for the sole purpose of prosecuting those who succumbed to extraordinary inducements, the disregard for safeguards designed to protect against abuses of due process, the willingness of those running the investigation to allow a thoroughly amoral individual free reign to use any means at his disposal to ensnare the unwary, the deliberate and pernicious government leaks to the press, and the deliberate attempt by the prosecution to withhold, cover-up and obfuscate exculpatory evidence require that the petitioner's conviction be overturned. Even if none of these abuses taken alone would justify reversal, taken together they provide a mosaic of such outrageous misuse of prosecutorial power and resulting unfairness to petitioner that the conviction obtained thereby must be overturned.[23]

WHEREFORE, petitioner respectfully urges this Court to grant certiorari and, upon that grant, to vacate the decisions of the Court of Appeals and the District Court and overturn his conviction.

Respectfully submitted,

RICHARD BEN-VENISTE
Attorney for Petitioner

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23. Petitioner Criden also adopts, to the extent applicable, the arguments set forth by his co-defendants in their related petitions for certiorari.

APPENDIX A — COURT OF APPEALS ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 81-1342; 81-1343; 81-1344; 81-1446; 81-1345; 81-1346; 81-1347

FILED NOV. 17, 1982

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of November, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL O. MYERS, ANGELO J. ERRICHETTI, LOUIS JOHANSON, and HOWARD L. CRIDEN,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

v.

Appendix A

FRANK THOMPSON, JR. and JOHN M. MURPHY,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

v.

RAYMOND F. LEDERER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the defendants-appellants, Michael O. Myers, Angelo J. Errichetti, Louis Johanson, and Howard L. Criden.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

s/ Maureen Mintzer
Operations Manager